

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
Huntington Division

CASIE JO MCGEE and SARAH
ELIZABETH ADKINS, *et al.*,

Plaintiffs,

v.

Civil Action No. 3:13-cv-24068
The Hon. Robert C. Chambers

KAREN S. COLE, *et al.*,

Defendants.

**OPPOSITION OF PLAINTIFFS TO DEFENDANT VERA J. MCCORMICK'S MOTION
TO EXTEND TIME FRAME TO FILE A RESPONSIVE PLEADING**

COME NOW, the Plaintiffs in the above captioned matter, by their counsel, and hereby submit the following Opposition to Defendant's Motion to Extend Time Frame to File a Responsive Pleading. In support thereof, Plaintiffs state as follows:

Facts

On October 1, 2013, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief challenging the constitutionality of those provisions of West Virginia law that deny them the right to marry. On October 2, 2013, Plaintiffs timely served a Summons and Complaint on Defendant McCormick. On October 4, 2013, Plaintiffs filed a Notice of Constitutional Question pursuant to Fed. R. Civ. P. 5.1(a) and served such Notice on the West Virginia Attorney General. On October 9, 2013, pursuant to Fed. R. Civ. P. 5.1(b), this Court certified the constitutional issues raised by Plaintiffs to the West Virginia Attorney General. Pursuant to Fed. R. Civ. P. 5.1(c), the Attorney General may intervene within sixty days of the filing of the Notice, thereby setting the deadline for his intervention on December 3, 2013.

On October 18, 2013, Counsel for Defendant McCormick contacted John H. Tinney, Jr., Counsel for the Plaintiffs, and requested an extension [of thirty days] for filing a responsive pleading. Mr. Tinney denied that request, but offered an alternative extension and a proposal for a stipulated briefing schedule. Counsel for Defendant McCormick did not respond to Mr. Tinney's alternative, but instead filed the instant motion with this Court, seeking an extension of at least forty-one days – from October 23, 2013 to December 3, 2013 -- until after the time has passed for intervention by the West Virginia Attorney General.

Argument

Plaintiffs do not object to a short, reasonable extension, but Defendant's request to extend their time to file a responsive pleading until the deadline for intervention by the West Virginia Attorney General is neither contemplated by Fed. R. Civ. P. 5.1 nor justified by good cause.

Rule 5.1 does not require that all progress in a case stop while the Attorney General considers intervention on a constitutional question. To the contrary, the only limitation placed on a matter during the intervention period is set forth in subsection (c), which prevents the Court from "enter[ing] a final judgment holding the statute unconstitutional." Fed. R. Civ. P. 5.1(c). Under the plain language of the rule, Defendant McCormick is simply incorrect that the Court may not make any determinations regarding the constitutionality of the challenged statutes during the intervention period. The Court can not only consider the constitutional questions but can even substantively rule on such. Regardless, there is certainly nothing preventing the timely filing of a responsive pleading by a party. As the Advisory Committee note to the 2006 Amendment to Rule 5.1 states,

Pretrial activities may continue without interruption during the intervention period, and the court retains authority to grant interlocutory relief. The court may reject a constitutional challenge to a statute at any time. But the court may not enter a final judgment holding a statute unconstitutional before the attorney

general has responded or the intervention period has expired without response. This rule does not displace any of the statutory or rule procedures that permit dismissal of all or part of an action--including a constitutional challenge--at any time, even before service of process.

Fed. R. Civ. P. 5.1 advisory committee's note. Defendant McCormick cannot look to the potential for intervention by the Attorney General as a reason for delaying her response to the Complaint.

Moreover, Defendant McCormick's allegations about the potential impact of this case on West Virginians cut against her efforts to delay this Court's consideration of this matter, as the delay she seeks prejudices the Plaintiffs. Defendant McCormick is, of course, correct that this case raises critically important issues that matter tremendously to a large number of West Virginians, but no one is more affected than the Plaintiffs and the other same-sex couples across West Virginia who are presently denied the ability to marry or whose marriages from other jurisdictions are denied recognition. The constitutional injuries they are presently experiencing are irreparable. *Cf. AFT - W. Va. v. Kanawha County Bd. of Educ.*, 592 F. Supp. 2d 883, 905 (S.D. W. Va. 2009) (violation of fundamental constitutional right sufficient to demonstrate irreparable harm). Moreover, as set forth in the Complaint, each plaintiff experiences daily both the tangible and intangible ramifications of Defendants' denials of marriage licenses. Complaint for Relief and Declaratory Judgment at ¶¶ 14-17, 27-36, and 46-47. Given the stakes for the Plaintiffs, Defendant McCormick cannot demonstrate sufficient good cause for such a lengthy delay in filing a responsive pleading.

WHEREFORE, Plaintiffs pray that this Court will deny Defendant McCormick's Motion to Extend Time Frame to File a Responsive Pleading, or, in the alternative, grant a more

limited extension of no more than ten days to file a responsive pleading, or grant such other relief as this Court deems just and proper in order that this matter proceeds expeditiously.

Dated: October 22, 2013

Respectfully submitted,

ATTORNEYS FOR PLAINTIFFS

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CERTIFICATE OF SERVICE

I hereby certify that the 22nd day of October, 2013, I electronically filed the foregoing
“*Opposition of Plaintiffs to Defendant Vera J. McCormick’s Motion to Extend Time Frame to
File a Responsive Pleading*” with the Clerk of the Court using the CM/ECF system which will
send notification of such filing to the following CM/ECF participant:

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I hereby certify that I have mailed the document by United States Postal Service to the
following non-CM/ECF participant:

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